5-6-2008

Rammell v. Idaho State Dept. of Agriculture Appellant's Brief Dckt. 34927

IN THE SUPREME COURT OF THE STATE OF IDAHO

REX RAMMELL and LYNDA RAMMELL, d/b/a ELK COUNTRY TROPHY BULLS, Appellants, -vs- IDAHO STATE DEPARTMENT OF AGRICULTURE, Respondent.	)	Supreme Court No. 34927 **APPELLANTS' BRIEF**

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I.

STATEMENT OF CASE

a. The Nature of the Case

Appellants Dr. Rex Rammell and Lynda Rammell, doing business as Elk Country Trophy Bulls, ("the Rammells" or "Dr. Rammell") are appealing to this Court the Memorandum Decision of the District Court of the Seventh Judicial District, the Honorable Brent J. Moss presiding, issued on November 9, 2007. That Memorandum Decision was rendered by the district court in its appellate capacity and in review of the Rammells' Petition For Judicial Review of the Final Order of the Deputy Director of the Department of Agriculture (the "Final Order") entered on May 5, 2005, against the Rammells. That Final Order was a result of a contested case and administrative hearing brought by the Department of Agriculture (the "Department") against the Rammells under the IAPA and the IDAPA Rules of the Department. In the Department's Administrative Complaint, the Department asserted that the Rammells violated an Idaho statute and several Department regulations concerning the containment, management and reporting requirements for domestic cervidae (elk) ranchers. In defense, Dr. Rammell attempted to assert at the administrative hearing before hearing officer, Jean Uranga (the "Hearing Officer"), and on review before the Deputy Director, Mike Everett (the "Deputy Director"), that the Department regulations Dr. Rammell purportedly violated were invalid as they were unconstitutional and or outside the scope of the Department's statutory authority and unreasonable. The Hearing Officer and the Deputy Director refused to allow Dr. Rammell to make his arguments. In his Petition for Judicial Review, Dr. Rammell asserted to the district court that this was a denial of his due process rights under the IDAPA and Department Rules and

also sought to have the Department regulations Dr. Rammell purportedly violated invalidated. The district court did not concur with the Rammells and upheld the Final Order.

b. Course of Proceedings Below

The Department filed its Administrative Complaint on June 6, 2004. Dr. Rammell responded with an Answer and then an Amended Answer. Both parties engaged in pretrial discovery and entered into a Pretrial Stipulation filed on October 8, 2004. *See* Exhibit 6, Agency Record, document No. 74. This Stipulation established various facts underlying the case. *See Id.* Pursuant to this Stipulation, the Department filed an extensive Motion in Limine on November 23, 2004, seeking to exclude evidence and witnesses that Dr. Rammell wished to present concerning the validity and reasonableness of the relevant Department rules. *See* Exhibit 6, Agency Record, document No. 34. Dr. Rammell also filed a Motion for Disqualification to disqualify the Hearing Officer for lack of sufficient expertise in the area of livestock management and diseases effecting cervidae. This Motion was denied.

The matter was set for an evidentiary hearing on December 15, 16 and 30, 2004. The Department appeared through various representatives and its Deputy Attorney General, Brian J. Oakey. Respondents appeared *pro se* through Dr. Rammell. Before the parties submitted testimony and evidence, the Hearing Officer took up the matter of the Department's Motion in Limine. The Hearing Officer ruled as a matter of law that "I don't have authority to invalidate an agency rule as being unreasonable." *See* Exhibit 1, Hearing Transcript, p. 29, lines 2-3. The Hearing Officer decided she would allow Dr. Rammell to present some evidence concerning the scope and reasonableness of the relevant rules to make a record for appeal, but nonetheless excluded or limited crucial evidence Dr. Rammell attempted to present on those issues.

Following the close of the hearing, the parties submitted written closing briefs. The final closing brief was received by the Hearing Officer on February 7, 2005. The Hearing Officer issued her Findings of Fact, Conclusion and Preliminary Order on March 3, 2005. This Preliminary Order was reviewed by the Deputy Director who issued her Final Order on April 12, 2005, affirming the Preliminary Order in all regards. The administrative proceeding was remanded to the Hearing Officer for an award of costs and attorney's fees for the Department, which in turn was affirmed by the Deputy Director.

Mr. Rammell filed his Petition for Judicial Review of Final Order on June 10, 2005, raising several issues for review by the district court. The District Court entered its Memorandum Decision affirming the Final Order, and the Rammells appealed the Memorandum Decision to this Court.

c. Statement of the Facts

Dr. Rammell is a licensed Idaho veterinarian. He and his wife, Lynda Rammell, used to operate a domestic cervidae ranch doing business as Elk Country Trophy Bulls. As a result of this administrative matter and other events, the Rammells have since quit the domestic cervidae ranching business.

When the Rammell's did operate their business, they maintained their elk at two separate facilities. Part of the year, the elk were at what was called the Green Canyon facility. The remainder of the year, the elk were returned to the Rammell's home ranch located at 1365 West 5500 South, Rexburg, Idaho 83440.

In December of 2003, Kelly Mortensen, an inspector with the Department of Agriculture, contacted Dr. Rammell to conduct an annual elk inventory of the elk located on the Rammell's

property in Rexburg. Dr. Rammell declined the invitation to allow the Department to conduct an inventory because it would require the Department to "work the elk", i.e. run the elk through a chute for counting purposes. When this procedure was done in the past, it resulted in considerable damage to Dr. Rammell's elk, including the loss of a bull elk's antlers, causing the elk to be destroyed. *See* Exhibit 3, Hearing Transcript, pp. 641-642, lines 18-16. Believing that "working the elk" constituted a seizure of property without due process, Dr. Rammell advised Kelly Mortensen he wanted to go to administrative hearing as soon as possible to contest the infringement of Dr. Rammell's constitutional rights and the reasonableness of the Department's rules in this regard.

By letter dated December 24, 2003, the Department asked Dr. Rammell to reconsider his position. That letter is signed by Dr. Dan Crowell, DVM, Chief, Bureau of Animal Health and Livestock. *See* Exhibit 6, Agency Record, document 78. That letter cites the applicable rules and statutes and requested Dr. Rammell to cooperate by submitting his annual domestic cervidae inventory to the Department no later than December 31, 2003, and requesting Dr. Rammell to cooperate with the Department to complete its inventory.

In response, Dr. Rammell sent a letter to Dr. Crowell dated December 31, 2003. *See* Exhibit 6, Agency Record, document No. 76. Dr. Rammell reiterated his concern that to allow the inventory would violate the Fourth Amendment to the Constitution. Also, Dr. Rammell argued the sole purpose of the monitoring program was to control Chronic Wasting Disease, which is not a threat in Idaho, making the pervasive regulation of elk ranching unnecessary and unreasonable. That letter contends there should be a voluntary certification program similar to that used to prevent and eradicate Scrapie in sheep. He explained that he was protesting the rules, stating:

> ... included in my protest in the rule which allows the State to run my elk through the chute for mandatory identification validation, the rule requiring a mandatory submission of my records, the rule requiring the mandatory submission of brains within 24 hours of an elk's death, and the mandatory payment of $5.00 per head per year (if the State is going to charge the breeders by the head each year then a similar fee must be placed on all other livestock). I also plan to protest the import rules, specifically the brain worm regulations and the unreasonableness and interference with our right to interstate commerce imposed by the five year CWD 'de facto' moratorium.
>
> I am not protesting or challenging the State's authority to inspect my facility or elk on a routine annual basis for facility adequacy and general elk health. Any other non routine inspection through out the year will, however, require a search warrant showing probable cause for the search and or seizure of my animals or records (see *OSHA v. Barlow*). Monday, December 29th, I invited Kelly Mortensen and Mark Hyndman to complete an animal inspection of my facility and elk herd, including a head count if desired. If the Department has probable cause to run a particular elk through the chute, the necessary Warrant will need to be provided for my cooperation.

See Exhibit 6, Agency Record, document No. 76.

An Administrative Warrant for Entry and Inspection was signed by the Honorable Brent Moss on January 15, 2004. An Amended Administrative Warrant for Entry and Inspection was issued by the Honorable Brent Moss on January 26, 2004.

On January 22, 2004, Dr. Dan Crowell called the Rammell residence and was informed Dr. Rammell was in Reno, Nevada. Mrs. Rammell agreed to allow the inspectors on the property. Dr. Crowell, Kelly Mortensen and Deputy Dusty Davidson, with the Madison County Sheriff's Office, conducted an inspection of the facility. They observed the exterior fence in the working alley leading to the restraint facility was cut and in need of repair. They also observed a gate in the south exterior fence were a snow drift had created gap between the gate and the adjacent post, which could possibly allow ingress and egress for small cervidae. They further observed one post where the fence wire was not attached to the post. A pole was down on the west side of the old restraint facility in the southwest corner of the bull pen. A gap in the fence

exceeding 24 feet between posts was also noted at another point in the fence. An official head count was made and indicated approximately fifty bulls, eighty to eighty-five cows and twenty-five or thirty calves. There was one visible dangle or cattle ID tag. All the elk except the calves had silver USDA tags which filled the requirements of official identification and were visible but not readable from a distance. Dr. Crowell advised both Dr. Rammell and Mrs. Rammell the Department would still need to do an inventory validation process which would require working the animals.

The Department obtained an extension of the Administrative Warrant and appeared at the Rammell residence on January 26, 2004, to continue the inventory verification. Dr. Crowell advised Dr. Rammell it would be impossible to complete the inventory verification without individually working the animals given the majority of the animals did not have identifiable tags on them that could be read from a distance. Dr. Rammell stated he had not placed USDA ID tags on the calf elk because he had planned to use tattoos. He stated that the use of tags created a negative impact on his hunting operation.

The Department then proceeded to remove snow in the area of the restraint facility and repaired the break in the east exterior fence of the working alley. Elk boxes were constructed and the Department officials and Deputy Davidson left the Rammell premises.

On January 27, 2004, Dr. Crowell and Mr. Mortensen, among other Department officials, returned to the Rammell residence with Deputy Dusty Davidson. They gathered the calves to inventory them. The calves were worked through the restraint systems. Department employees determined the sex of the calves and recorded identification for each of the calves. One cow was found in the same pasture and had a dangle or cattle tag that could be read from a distance. The Department counted twenty-four calves and one cow that day.

The Department employees returned January 28, 2004, to inventory the elk cows. The Department brought snow machines to gather the cows. When the cows were gathered, two additional calves were found with the cows.

The Department officials again returned January 29, 2004, to inventory the bulls. The Department's inventory found the number of elk that day, including fifty-two bulls, six cows and two calves.

Department officials videotaped the elk to document the condition of the elk after the inventory was completed. A few of the bulls were stiff and had abrasions on their sides following the inventory. Dr. Rammell did notify Dr. Crowell that an antler with three small points had been knocked off one elk during the process. This antler was found by Deputy Davidson who observed the working of the elk and was presented to the Hearing Officer by Mr. Rammell as an exhibit. *See* Exhibit 6, Agency Record, Rammell Exhibits 122 and 123.

On January 30, 2004, Dr. Crowell arrived at the Rammell residence to do a records inventory. Dr. Crowell brought a copy machine, paper and other equipment with him. When comparing the 2004 inventory numbers with the inventory done in 2003, the Department determined by their count that twenty-eight head of elk were missing. Dr. Rammell disputed this claim and submitted evidence which was ignored by the Hearing Officer that there were no missing elk. *See* Exhibit 3, pp. 651-653, lines 7-20; Exhibit 6, Agency Record, documents No. 66. The Department claimed that 28 elk were missing because they couldn't find the elk with tag numbers that matched the previous inventory. But Dr. Rammell showed them using the Department's own records that the head count was correct regardless of the fact that the numbers were missing. *See Id.* Mr. Rammell asked that this charge in the original Administrative

Complaint be dismissed as the number, 28, was wrong. The Hearing Officer declined and then inexplicably and unilaterally amended the number of missing elk to 23.

By August, 2004, Dr. Rammell corrected the fencing problems and paid the $5.00 per head fee in order to purchase and transport further domestic cervidae to his ranch. Mr. Rammell fixed all of the fencing problems within a few days, but representatives of the Department never came back to see if the problems had fixed until August.

Nonetheless, the Department filed its Administrative Complaint citing a violation of Idaho Code § 25-3708 (Five ($5) dollars per elk administrative fee) and eight (8) violations of Department rules regarding fencing, inventorying, and movement of elk. Specifically, the Department cited:

1. Failure to remit the five (5) dollar per head administrative fee for 2004, pursuant to I.C. § 25-3708;
2. Failure of cervidae to have official identification by December 31 on calves pursuant to IDAPA 02.04.19.021;
3. Failure to have a certain portion of the perimeter fence properly affixed to the posts pursuant to the requirements of IDAPA 02.04.19.102.03(b);
4. Violation of IDAPA 02.04.19.102.04 for having an excessive gap between fence posts;
5. Violation of IDAPA 02.04.19.102.05 for having a gate with an excessive gap;
6. Violation of IDAPA 02.04.19.102.06 for having a cut perimeter fence and a fence with a pole down, creating a gap;
7. Violation of IDAPA 02.04.19.200 and 201 for not submitting an annual domestic cervidae report and violation of IDAPA 02.04.19.200 and 250 for

having twenty-eight (28) head of domestic cervidae unaccounted for and for moving domestic cervidae in 2003 from one premises to another without submitting an Interstate Movement Certificate;

8. Violation of IDAPA 02.04.19.202 for not gathering and restraining domestic cervidae for inventory verification; and
9. Violation of IDAPA 02.04.19.250 for moving in 2004 domestic cervidae from one premise to another without submitting an Interstate Movement Certificate.

After the conclusion of the administrative hearing, the Hearing Officer found Dr. Rammell liable on all nine (9) counts, resulting in a fine of $29,000 plus costs and attorney's fees. *See* Exhibit 6, Agency Record, document No. 66, p. 14. As stated, the Hearing Officer refused to consider Dr. Rammell's challenge to the constitutionality of the statute he allegedly violated or whether the rules where unreasonable or beyond authority of the Department to promulgate. *See Id.* at pp. 14-17. The Hearing Officer claims as a matter of law she had no authority to consider such challenges. *Id.*

On review, the Deputy Director affirmed the Preliminary Order in all regards. *See* Agency Record, document No. 68, p. 13. The Deputy Director emphasized that all evidence about the reasonableness of the Department rules should have been excluded, that such a determination is entirely an issue of law and that a party to an administrative hearing before the Department can only raise such a challenge in front of the Department Director upon review of a preliminary order. *Id.* at pp. 8, 10-11.

Mr. Rammell filed his Petition for Judicial Review of the Final Order on June 10, 2005, raising several issues for review by the district court, which can be summarized as follows:

1. Whether the Hearing Officer violated the Rammells' due process rights in

excluding evidence of the reasonableness of the relevant Department Rules;

2. Whether I.C. § 25-3708 was constitutional;
3. Whether the Department rules at issue were unreasonable and beyond the scope of the Department's authority;
4. Whether the hearing officer should have recused herself; and,
5. Whether the award of attorney's fees and costs was proper.

Before the district court, Mr. Rammell briefed and argued primarily the issue of whether the Hearing Officer violated the Rammells' due process rights. In its Memorandum Decision, the District Court held that the Hearing Officer did not violate Mr. Rammell's due process rights by excluding evidence of the reasonableness of the Department Rules.

II.

ISSUES ON APPEAL

1. Whether the Hearing Officer violated the Rammells' due process rights in excluding evidence of the reasonableness of the relevant Department Rules;
2. Whether I.C. § 25-3708 is constitutional;
3. Whether the hearing officer should have recused herself;
4. Whether the Department rules at issue were unreasonable and beyond the scope of the Department's authority; and,
5. Whether the award of attorney's fees and costs was proper.

III.

STANDARD OF REVIEW

Where a district court acts in its appellate capacity pursuant to the Idaho Administrative Procedure Act (IDAPA), this Court reviews the agency record independently of the district court's decision. *Levin v. Idaho State Bd. of Medicine,* 133 Idaho 413, 417, 987 P.2d 1028, 1032 (1999); *Lamar Corp. v. City of Twin Falls,* 133 Idaho 36, 39, 981 P.2d 1146, 1149 (1999). The Court will defer to the agency's findings of fact unless those findings are clearly erroneous and unsupported by evidence in the record. *Lamar Corp.,* 133 Idaho at 39, 981 P.2d at 1149. This Court may not substitute its judgment for that of the agency as to the weight of the evidence on factual matters. I.C. § 67-5279(1); *Levin,* 133 Idaho at 417, 987 P.2d at 1032.

An agency's order must be upheld by the reviewing court unless its decision (a) violates statutory or constitutional provisions; (b) exceeds the agency's statutory authority; (c) is made upon unlawful procedure; (d) is not supported by substantial evidence in the record; or (e) is arbitrary, capricious, or an abuse of discretion. I.C. § 67-5279(3).

IV.

THE HEARING OFFICER'S EXCLUSION OF EVIDENCE ON THE ISSUE OF THE REASONABLENESS OF THE DEPARTMENT'S RULES VIOLATED THE RAMMELLS' DUE PROCESS RIGHTS

In his Amended Answer to the Administrative Complaint, Dr. Rammell challenged as unreasonable and invalid each Department Rule he was cited for violating. *See* Exhibit 6, Agency Record, document No. 6. The basis for Dr. Rammell's challenge was that the

Department was empowered with making rules and regulations pursuant to I.C. § 25-3704 for the sole purposes of prevention of diseases. *See* I.C. § 25-3704; *see also* Exhibit 6, Agency Record, document No. 51 and Exhibit 2, Hearing Transcript, pp. 465-468, lines 24-16. Dr. Rammell contends that the regulations he was cited for violating had no relation to preventing diseases (namely Chronic Wasting Disease) and are thus unreasonable and beyond the scope of the Department's rule making authority. *See* Exhibit 6, Agency Record, document No. 51. Dr. Rammell also argued that there is no Chronic Wasting Disease in Idaho and that there is no likely threat of the spread of the disease due to domestic cervidae operations, further making the regulations unreasonable. *Id.*

As stated above, the Hearing Officer concluded she had no authority to rule whether a Department Administrative Rule was unreasonable. *See* Agency Record, document No. 66, pp. 16-17. The Hearing Officer provided no authority for this conclusion. Despite that fact, the Deputy Director upheld the Hearing Officer's legal conclusion, stating that the reasonableness of an administrative rule is not evidentiary, that such a challenge is an issue of law and thus not a matter for a hearing officer. *See* Exhibit 6, Agency Record, document No. 68, pp. 8, 10. The Deputy Director cited I.C. § 67-5225(3) and I.C. § 67-5279(2) as authority supporting this conclusion. The Deputy Director went further and declared that in the future any such challenge was to be made directly to the Director of the Department or his designee, despite the Attorney General's Rules of Administrative Procedure to the contrary. *Id.* at p. 9.

Upon review, Mr. Rammell pointed out to the district court that I.C. § 67-5225(3) and I.C. § 67-5279(2) state nothing about whether a "reasonableness" challenge to an Administrative Rule is to be confined to merely questions of law or whether a Hearing Officer in an administrative hearing can take in evidence on such an issue. Dr. Rammell also asserted to the

district court that the Idaho Attorney General's Rules of Administrative Procedure explicitly state that the issue of whether an Administrative Rule is within an agencies rule making power can be determined by a hearing officer. *See* IDAPA 04.11.01.416. I.C. § 67-5206(5)(b) states that the Attorney General's Rules of Administrative Procedure will control administrative proceedings of Idaho agencies unless an agency adopts its "own procedures... [with] a finding that states the reasons why the relevant portion of the attorney general's rules were inapplicable to the agency under the circumstances." I.C. § 67-5206(5)(b). A review of the Idaho Department of Agriculture's Administrative Rules shows that the section of those rules concerning the scope of authority of hearing officers is almost exactly similar as that of the Attorney General's, except that the Department's Rule in no way addresses the issues of challenges to statutes or review of Administrative Rules. *See* IDAPA 02.01.01.010.05, compare IDAPA 04.11.01.413, 415 and 416. Given that the Department's Administrative Rules fail to address the crucial issues of review of statutes or rules, Mr. Rammell argued to the district court, the "relevant portion" of the Attorney General's rules would then apply to the Department under I.C. § 67-5206(5)(b), namely IDAPA 04.11.01.416 would thus apply to the Department. Thus the Hearing Officer in this case should have been able to consider the issue of the reasonableness of the Department rules being enforced against Dr. Rammell.

This district court rejected Mr. Rammell's argument and held that given IDAPA 04.11.01.416's use of the word "may", that rule gave agencies discretionary authority whether to hear challenges to rules in a contested case. *See* Record, 159-160. The district court concluded that since the Director of the Department had not delegated such authority to the Hearing Officer, the Hearing Officer was not obliged to hear arguments. *Id.* The district court surmised that the

Rammells had other channels within which to challenge the reasonableness of the Department rules, citing I.C. § 67-5273(1), declaratory judgment proceedings and proposing rule changes.

Mr. Rammell contends that the district court's ruling and the Department's ruling are in legal error. A fundamental right of due process is the "right to a fair opportunity to defend against the State's accusations," *Chambers v. Mississippi,* 410 U.S. 284, 294 (1973), and "a meaningful opportunity to present a complete defense," *California v. Trombetta,* 467 U.S. 479, 485 (1984). "It goes without saying that the requirements of a fair hearing include notice of the claims of the opposing party and an opportunity to meet them." *Federal Trade Com'n v. National Lead Co.* 352 U.S. 419, 427 (1957). *See also Mortimer v. Riviera Apartments*, 122 Idaho 839, 840 P.2d 383 (1992)("Moreover, it would be manifestly unfair and likely in derogation of procedural due process to determine an issue with potentially significant financial consequences against a party who was not given notice or an opportunity to defend.)

The state, via the Department, has accused the Rammells of violation of several Department rules and an Idaho Statute. The Rammells' main defense was that the rules were unreasonable. He was denied the ability to raise this defense in the very proceeding where such a defense was relevant. The Department should have no discretion whether or not to hear evidence on the reasonableness of administrative rules. The four-prong test set forth by this Court in *J.R. Simplot Co. v. Tax Com'n,* 120 Idaho 849, 820 P.2d 1206 (1991), clearly contemplates both issues of law and fact and involved in determining whether a rule is reasonable or not. It is not disputed by the State that the Hearing Officer excluded the main element of evidence that Mr. Rammell wished to present to challenge the reasonableness of the Department rules, namely the testimony of Dr. Clarence Siroky.1 Mr. Rammell asks that the

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1 At the administrative hearing, Dr. Rammell called Dr. Clarence Siroky, the then Administrator of the Department of Animal Industries and State Veterinarian. *See* Exhibit 2 at pp. 448-488, lines 18-10. His testimony

Court hold that an Idaho agency must hear evidence related to the reasonable of a rule if such a defense is raised. Mr. Rammell also asks that IDAPA 04.11.01.416 be found to have been unconstitutional as applied to Mr. Rammell as in violation of his due process rights under the Fourteenth Amendment and by incorporation the Fifth Amendment to the United States Constitution.

V.

I.C. § 25-3708 IS UNCONSTITUTIONAL

The Rammells assert that I.C. § 25-3708 is unconstitutional. This statute allows collection of an annual "fee" per head of domestic cervidae to be remitted to the Department for purposes related to cervidae management.

First, this statute violated the equal protection clause of the United States Constitution. "It is generally presumed that legislative acts are constitutional, that the state legislature has acted within its constitutional powers, and any doubt concerning interpretation of a statute is to be resolved in favor of that which will render the statute constitutional." *Olsen v. J.A. Freeman Co.*, 117 Idaho 706, 709, 791 P.2d 1285, 1288 (1990). "Under either the Fourteenth Amendment

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was excluded on the grounds of relevance and foundation. The relevance objection was merely that there was no allegation in the Administrative Complaint concerning disease. That objection was sustained. *See Id.* at p. 462, ls7-20; p. 464, lines 9-14; and p. 465, lines 12-21.

Dr. Rammell made an offer of proof, stating that Dr. Siroky's testimony would, as the enforcer and promulgator of the Department Rules, show that the Department's Rules at issue have no or minute preventative effect with regard to the dissemination of disease among elk and that there is little or no risk of Chronic Wasting Disease in Idaho. *See Id.*, pp. 465-466, lines 24-24. Clearly, such testimony is relevant, necessary and crucial to Dr. Rammell's contention that the rules at issue are invalid.

The Foundation objection was made when he was asked about the reasonableness on the ground that Dr. Siroky was not with the Department at the time the Rules were promulgated. *See Id.* at pp. 474-479, lines 2-25. Dr. Siroky was charged with implementation and enforcement of Department Rules then in existence, which included the Rules at issue. He clearly has knowledge at to whether the Rules are in any way effective in preventing disease and thus have any nexus to the purposes of the statute under which they were created.

The exclusion of this crucial and necessary testimony prejudiced Dr. Rammell's argument in this regard and prevented him from mounting a defense – a violation of I.C. § 67-5279(3)(a)(c) and (e).

or the Idaho Constitution, a classification will survive rational basis analysis if the classification is rationally related to a legitimate governmental purpose." *Meisner v. Potlatch Corp.,* 131 Idaho 258, 262, 954 P.2d 676, 680 (1998). "Under the 'rational basis test,' a classification will withstand an equal protection challenge if there is any conceivable state of facts which will support it." *Bint v. Creative Forest Prods.,* 108 Idaho 116, 120, 697 P.2d 818, 822 (1985).

Under I.C. § 25-3701, cervidae ranching and domestic cervidae are considered an agricultural pursuit and livestock respectively. No other subsection of livestock or the ranching thereof mentioned in the Idaho Code is subject to any special fee similar to this. I.C. § 25-3708 economically discriminates against cervidae ranchers. No rational basis is set forth in the statutory scheme justifying this unique fee, and no basis can be offered other than the fact that cervidae ranching is disfavored by the Department.

In the alternative, I.C. § 25-3708 is unconstitutional under Article III, Section 19 of the Idaho Constitution, which states in pertinent part that the "Legislature shall not pass local or special laws in any of the following enumerated cases, that is to say: .... For the assessment and collection of taxes." The "fee" collected under I.C. § 25-3708 is, under *Kootenai County Property Ass'n v. Kootenai County,* 115 Idaho 676, 769 P.2d 553 (1989), a tax. In *Kootenai,* this Court held that an annual solid waste disposal fee was not a tax because that fee was "reasonably related to the services rendered by the county in acquiring, establishing, maintaining and operating its solid waste disposal system." *Id.* at 680, 769 P.2d at 557. Here, the "fee" under I.C. § 25-3708 does not go toward providing any service. The "fee" goes to funding the government regulation of cervidae. It is the epitome of a tax, and it is unconstitutional because it is levied discriminatorily only on one type of livestock and not on all types of livestock despite the fact that the Idaho Code treats all livestock similarly. *See* Title 25, Chapters 1, 2, 3, 4, and 6 of the

Idaho Code; *see also* I.C. § 25-3701. To date no other livestock industry pays such a fee; only cervidae ranching is subject to this fee.

VI.

THE HEARING OFFICER SHOULD HAVE DISQUALIFIED HERSELF

Dr. Rammell made a pre-hearing Motion to Disqualify the Hearing Officer pursuant to I.C. § 67-5252. *See* Exhibit 6, Agency Record, document No. 49. I.C. § 67-5252 states that a party can disqualify a presiding officer for bias and lack of expert knowledge. *See* I.C. § 67-5252. The Motion was based upon the fact that Dr. Rammell wished to contest the reasonableness of the applicable rules which would require that the Hearing Officer have some knowledge of the industry so as to better be able to make rulings and determinations on the record with regard to objections and the issue of reasonableness. *See Id.* The Hearing Officer did not deny she lacked expert knowledge of the cervidae industry, however, she denied this Motion. *See* Exhibit 6, Agency Record, document No. 65; Exhibit 2, pp. 488-490, lines 17-16. If reasonableness of the Rules were an issue before the Hearing Officer, which as argued above it properly should have been, then the Hearing Officer should have recused herself for lack of expertise in the field of cervidae. Not to do so was an error.

VII.

THE DEPARTMENT RULES ENFORCED AGAINST THE RAMMELLS ARE UNREASONABLE

The Rammells assert that the Department rules they were cited for violating are unreasonable.

Under *J.R. Simplot Co. v. Tax Com'n,* 120 Idaho 849, 820 P.2d 1206 (1991), an agency rule is invalid, among many reasons, if it does not have a reasonable relationship to the statute. *Id.* at 862, 820 P.2d at 1219. The statute in question is I.C. § 25-3704, which states:

> The administrator of the division of animal industries is hereby authorized and empowered to make, promulgate, and enforce general and reasonable rules not inconsistent with law, **for the prevention of the introduction or dissemination of diseases among domestic cervidae** of this state, and to otherwise effectuate enforcement of the provisions of chapters 2, 3, 4, 6 and 37, title 25, Idaho Code, applicable to domestic cervidae.

(emphasis added). Under this statute, Department rules must relate to disease introduction or prevention.

The first rule the Rammells were cited for violating, IDAPA 02.04.19.021, demands that cervidae have official identification. IDAPA 02.04.19.102.03(b) requires the perimeter fence be properly affixed to the posts according to exacting specifications, i.e. not more than 12 inches apart. IDAPA 02.04.19.102.04 requires that fence posts be of certain, exacting specifications, including that they be no more than twenty-four (24) feet apart. These rules have no relation to prevention of disease. Clearly any number of type of fences with differing specification could sufficiently contain domestic cervidae and ward off encounters with wild cervidae. The Department has set up an arbitrary set of specification where none is necessarily needed. This is not reasonably necessary to prevent disease. A wild cervidae would merely have to place its

nose between or over any fence and make contact with a domestic cervidae and thus transmit disease. This of course is a subjective analysis that should be made by the inspectors depending on the lay of the land and other factors. To set arbitrary numbers on specifications is neither general nor reasonable. The State recognizes this fact by providing in the fencing section exceptions to their own rules as determined by the Department. IDAPA 02.04.19.102.03(b) and IDAPA 02.04.19.102.04.

IDAPA 02.04.19.102.05 requires gates that "prevent escape of domestic cervidae or ingress of wild cervidae," and IDAPA 02.04.19.102.06 demands that fences be maintained to prevent escape of domestic cervidae or entry of wild cervidae. These are not reasonable because they are excessively vague and not related to the purpose of preventing disease for the same reason cited above, i.e. that wild cervidae can make contact with domestic cervidae through gates and fences of any type unless the fence hermetically seals the domestic cervidae, which no fences containing domestic livestock do. The main purpose behind the aforementioned regulations is to facilitate mere regulatory control on the part of the Department over elk ranchers and not disease prevention.

IDAPA 02.04.19.202 requires cervidae owners to gather and restrain domestic cervidae for inventory verification, IDAPA 02.04.19.200 requires submission of annual domestic cervidae reports, and IDAPA 02.04.19.250 requires certificates for interstate movement of domestic cervidae. Again these rules have no relationship to prevention of disease. They are geared toward management and control of domestic ranch operations. If the rules tied in specifically with testing of cervidae for disease then perhaps there would be a reasonable link. But there is none. The true motive behind these rules is, Dr. Rammell surmises, to closely regulate an

industry competitive with State licensing for wild cervidae hunting and to prevent poaching of wild elk.

VIII.

THE AWARD OF ATTORNEY'S FEES SHOULD BE VACATED

Attorney's fees and costs in the amount of $29,372.96 were awarded to the Department under I.C. § 12-117(1) on the grounds that Dr. Rammell's contest to the Administrative Complaint was without basis in law or fact. *See* Exhibit 6, Agency Record, document No. 69 and 70. The district court halved this award for attorney's fees on the ground that the Hearing Officer bore some responsibility for the creation of an unnecessary and lengthy record in this case. *See* Record, p. 161.

If on appeal, the Final Order and/or the memorandum decision is reversed, then clearly he had a basis in law and in fact to justify his contest and the award of attorney's fees should be reversed.

If Dr. Rammell does not prevail on any of his issues he has appealed, he is still entitled to a reversal of the award of attorney's fees. Count 7 of the Administrative Complaint contends that Dr. Rammell lost twenty-eight (28) elk in violation of IDAPA 02.04.19.200 and 250. During the hearing Dr. Rammell challenged this unstipulated factual contention, which resulted in the Hearing Officer finding that in fact only twenty-three (23) elk were unaccounted for. *See* Exhibit 3, pp. 651-653, lines 7-20; Exhibit 6, Agency Record, documents No. 66. Dr. Rammell's case was not without a factual basis. The facts show that he did not fail to account for twenty-eight (28) elk and that the Department was incorrect on that point. Thus Dr. Rammell's contest

was not devoid of any basis in law or fact and the award of attorney's fees should be reversed in their entirety.

IX.

CONCLUSION

It is a fact of the regulatory universe that once promulgated, an Administrative Rule will not come under judicial scrutiny until challenged. When an individual is brought into an administrative hearing on an Administrative Complaint, it is entirely logical that the defendant should be able, as a defense, to challenge the validity of the rule for which he is accused of violating. This is directly supported by the IDAPA and the Administrative Rules of the Attorney General, which apply in relevant part to the Department. Dr. Rammell sought to challenge the rules at issue, but was prevented from obtaining a competent Hearing Officer and prevented from introducing relevant and crucial evidence in his defense. Dr. Rammell asks that the administrative case before him be dismissed without further action. *See Bonner Gen. Hosp. v. Bonner County*, 133 Idaho 7, 981 P.2d. 242 (1999). In the alternative, Dr. Rammell asks that the case be remanded so that he may mount a challenge to the validity of the relevant rules as should have been done in the first hearing.

DATED this 6th day of May 2008.

RUNFT & STEELE LAW OFFICES, PLLC

By: _____
KARL J.F. RUNFT
Attorney for Rex and Lynda Rammell

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 6th day of May 2008, a true and correct copy of the foregoing APPELLANT'S BRIEF, was served upon opposing counsel as follows:

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X US Mail
____ Personal Delivery
____ Facsimile

RUNFT & STEELE LAW OFFICES, PLLC

By: _____
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